In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-233.

PERSONNEL ADMINISTRATOR OF THE COMMONWEALTH OF MASSACHUSETTS ET AL.,
APPELLANTS,

v.

HELEN B. FEENEY,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Brief for the Appellants.

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Opinions Below.

The first opinion of the United States District Court for the District of Massachusetts in this cause is dated March 29, 1976, and appears at 415 F. Supp. 485 (App. 195-240). The second opinion of the district court, entered on May 3, 1978, and issued after reconsideration in accordance with this Court's order of remand, appears at 451 F. Supp. 143 (App. 251-279).

A third lower court opinion in this cause, albeit one of limited significance on the issues presented on appeal, was issued by the Supreme Judicial Court of the Commonwealth of Massachusetts on September 16, 1977. That opinion provides an answer to the question certified by this Court concerning the authority of the Attorney General to proceed with an appeal in this case (App. 243-244). It is not yet reported in the official Massachusetts Reports, but appears at 366 N.E. 2d 1262.

Jurisdiction.

The present appeal is from a final order of a three-judge panel of the United States District Court for the District of Massachusetts convened pursuant to 28 U.S.C. §§ 2281 and 2284. That order enjoined the Personnel Administrator and other state officials from utilizing Mass. Gen. Laws c. 31, § 23, in the future selection of persons to fill civil service positions within the Commonwealth. The order was predicated on a finding that Mass. Gen. Laws c. 31, § 23, is unconstitutional. It was entered on May 3, 1978, and the notice of appeal was filed in the district court on June 13, 1978 (App. 280). Appellants filed their jurisdictional statement on August 10, 1978. Probable jurisdiction was noted on October 10, 1978. 47 U.S.L.W. 3239. Jurisdiction of this Court is conferred by 28 U.S.C. § 1253.

Statute Involved.

Although the suits filed in the district court challenged Mass. Gen. Laws c. 31, §§ 21-25, only § 23 was found to be

unconstitutional and it is the sole Massachusetts statute directly before this Court on appeal (App. 193-194). At the time of the first district court opinion[1] Mass. Gen. Laws c. 31, § 23, provided:

> The names of persons who pass examinations for appointment to any position classified under the civil service shall be placed upon the eligible lists in the following order:—
>
> (1) Disabled veterans as defined in section twenty-three A, in the order of their respective standing; (2) veterans in the order of their respective standing; (3) persons described in section twenty-three B in the order of their respective standing; (4) other applicants in the order of their respective standing. Upon receipt of a requisition, names shall be certified from such lists according to the method of certification prescribed by the civil service rules. A disabled veteran shall be retained in employment in preference to all other persons, including veterans.

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[1] On June 24, 1976, the Governor of the Commonwealth signed into effect Mass. St. 1976, c. 200, a statute establishing an interim veterans' preference statute which would operate only during the pendency of this appeal. Mass. Gen. Laws c. 31, § 23 (Supp. 1978-1979). The interim statute in its currently effective form is set out as an appendix to the jurisdictional statement (J.S. App. 33a).

On January 1, 1979, the Civil Service laws will be recodified by Mass. St. 1978, c. 393, enacted July 12, 1978. Under the recodification, Mass. Gen. Laws c. 31, § 23, will be replaced by the first and last paragraphs of Mass. Gen. Laws c. 31, § 26. The interim veterans' preference statute, Mass. St. 1976, c. 200, also will be amended to reflect the recodification, Mass. St. 1978, c. 393, §§ 41, 42. The amendment will not work any substantive changes in the relevant statutes.

Question Presented.

Does the civil service ranking preference extended to veterans by Mass. Gen. Laws c. 31, § 23, deny female civil service applicants equal protection of the law in violation of the Fourteenth Amendment?

Statement of the Case.

I. Prior Proceedings.

The procedural history of this case is long and relatively complex; the case has already required some form of consideration by this Court on three separate occasions and the merits of the appeal raise questions as to two different district court opinions. The case has proceeded in three distinct stages and this statement is organized accordingly.

A. *The Original District Court Proceedings.*

On November 4, 1974, Carol A. Anthony filed a complaint in the United States District Court for the District of Massachusetts, seeking to enjoin the enforcement of Mass. Gen. Laws c. 31, §§ 21-25.[2] A three-judge district court was convened to hear the case pursuant to 28 U.S.C. §§ 2281 and 2284 (App. 70).

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[2]Named as party defendants were the Commonwealth of Massachusetts, the Division of Civil Service, the Civil Service Commission and the Director of Civil Service. After commencement of the action but prior to decision, the position of the Director of Civil Service was eliminated and its functions transferred to the Personnel Administrator of the Commonwealth. Mass. St. 1974, c. 835.

The gravamen of the complaint was that the veterans' preference statute deprived the plaintiff of equal protection of the laws because it operated to exclude women from public employment and perpetuated the effect of sex discrimination established by federal regulations concerning military service.

On May 20, 1975, Helen B. Feeney filed a complaint against the same defendants raising the same issues and alleging the same claims as plaintiff in the *Anthony* case. Feeney also sought an order restraining the defendants from making or approving any appointment to any permanent position from the eligible list for positions classified as Administrative Assistant or Head Administrative Assistant at the Solomon Mental Health Center in the Department of Mental Health of the Commonwealth. The requested order further sought extension of the expiration date of the eligible list for the latter position. The order was assented to and duly entered, and on May 23, 1975, the court consolidated the two actions (App. 61).

The defendants moved to dismiss the *Anthony* case as moot because of the passage of an act exempting all attorney positions, including those classified as Counsel I, from the provisions of civil service law. Mass. St. 1975, c. 134. They also moved to dismiss the *Feeney* case for want of subject matter jurisdiction and failure to state a claim upon which relief could be granted. Counsel executed lengthy statements of agreed facts, submitted simultaneous briefs on all issues, and presented oral argument to the three-judge panel on the merits.

On March 29, 1976, the three-judge district court issued the final order and opinions reproduced at 415 F. Supp. 485 (D. Mass. 1976) (App. 195-240). The court found that the claims brought by the plaintiffs in the *Anthony* case were moot. The court further found that neither the Commonwealth of Massachusetts nor the Division of Civil Service were "persons" within the meaning of 42 U.S.C. § 1983 and therefore dis-

missed the complaints against them. No notice of appeal was filed as to these aspects of the final judgment and order.

The court permanently enjoined the remaining defendants[3] from utilizing the veterans' preference statute in ranking eligibles for civil service positions within the Commonwealth. The sharply-divided court held that Mass. Gen. Laws c. 31, § 23, had the effect of depriving female civil service applicants of equal protection of the laws and was unconstitutional. The majority opinion based this holding on an analysis of the impact of the statute on female applicants and not on the basis of its purpose. The dissent of Murray, D.J., strongly suggested that the impact analysis employed by the majority was not the proper means to assess the constitutionality of a state statute allegedly violating the Equal Protection Clause of the Fourteenth Amendment. Applying a rational basis test to the challenged statute, Judge Murray concluded that the veterans' preference law passed constitutional muster.

B. *Actions Related to the Original Appeal.*

On May 25, 1976, the Attorney General of the Commonwealth filed a notice of appeal from the partial final judgment invalidating Mass. Gen. Laws c. 31, § 23. An application for an extension of time to docket the appeal was filed with this Court on July 17, 1976, and allowed by order of Brennan, J., on July 20, 1976. The Appellants docketed their appeal on August 23, 1976. Subsequently, the nominal defendants advised the Clerk of this Court by letter that the appeal was not authorized by them and that it was taken over their objection. Their request that the Court dismiss the appeal was echoed in

[3]The remaining defendants are the Civil Service Commission and the Personnel Administrator, who supplanted the Director of Civil Service, n.2, *supra*.

a motion to dismiss or affirm filed by the Appellee and an *amicus curiae* brief in opposition to jurisdiction filed by the Commonwealth's Secretary of Administration and Finance "with the knowledge and approval of the Governor."

On November 8, 1976, this Court certified a single question to the highest court of the Commonwealth. In essence, the question posed was whether the Attorney General had the authority to prosecute an appeal to this Court over the expressed objection of the named state defendants against whom judgment was entered. On September 16, 1977, the Supreme Judicial Court answered the question in the affirmative, confirming the authority of the Attorney General to appeal this particular case.

Upon receipt of this answer, this Court summarily disposed of the appeal. In a *per curiam* order dated October 11, 1977, the Court vacated the judgment below and remanded the case for further consideration in light of *Washington* v. *Davis*, 426 U.S. 229 (1976).[4]

C. *Subsequent District Court Proceedings and the Instant Appeal.*

Just eight days after this Court's vacation of judgment and order of remand, the district court, acting *sua sponte*, ordered the parties to submit briefs addressing the issues raised by the remand. The Agreed Statement executed in 1975 was not updated and no further evidence was submitted by the parties.

On June 13, 1976, the district court, divided as it had been in its earlier opinion, found Mass. Gen. Laws c. 31, § 23, to be violative of the Equal Protection Clause of the Fourteenth Amendment. Except on matters related to discriminatory intent, the opinion relies heavily upon the original district

[4]Three justices (Powell, J., Brennan, J., and Marshall, J.) would have noted probable jurisdiction and set the case for oral argument (App. 245).

court opinion appearing at 415 F. Supp. 485 (App. 195-240).[5] A timely notice of appeal was filed in the district court (App. 280-281), a timely jurisdictional statement was filed in this Court, and jurisdiction was duly noted. 47 U.S.L.W. 3239.

II. Facts of this Case.

At the commencement of this action, the plaintiff, Helen B. Feeney, was a 53-year-old female residing in the Commonwealth of Massachusetts (App. 175). She is not a veteran and never applied[6] for admission to any branch of the armed services of the United States (App. 83, 180).

Ms. Feeney entered the work force in 1948 and was employed almost continuously for 27 years thereafter. Prior to 1963 she worked exclusively in private industry and apparently never sought to enter state service (App. 176). In 1962 she passed a civil service examination and on April 24, 1963, she received an appointment to the State's Civil Defense Agency. She served continuously in that agency for approximately the next 12 years, and for approximately the last eight years of that period served as the agency's "Federal Funds and Personnel Coordinator" (App. 176-178). She became unemployed when

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[5]The 1978 opinion contains the lower court's reasoning only on matters arising from reconsideration in light of *Washington* v. *Davis*, 426 U.S. 229 (1976). It is the earlier 1976 opinion discussed above in part IA which sets forth the district court's treatment of the other issues in the case. Viewed separately, each of the two opinions tells an incomplete story about the case; viewed together, they form an integrated whole. Conceptually, then, the two district court opinions must be treated as one.

[6]During World War II, Ms. Feeney did inquire as to enlistment programs for women, but was informed that parental consent was a precondition of enlistment by females. Her mother apparently declined to provide that permission on the ground that "the general reputation of the type of female who joined the military was not good" (App. 180).

the Commonwealth effectively eliminated the agency in March, 1975 (App. 176).

During the period from July 1, 1963, through June 30, 1973, the appointing authorities of the Commonwealth and its political subdivisions made 47,005 appointments to permanent positions in the Classified Official Service (App. 79). More than 68 per cent of those appointed were nonveterans. Forty-three per cent of those appointed were females and 57 per cent of them were males (App. 79). Fifty-four per cent or 14,476 of the males appointed were veterans (App. 79), while approximately 47 per cent of the males who composed the Massachusetts work force during the relevant period were veterans (App. 83). Fewer than 1 per cent of the women of working age in Massachusetts were veterans at the time (App. 83), and they obtained just under 2 per cent of the permanent positions awarded to female applicants (App. 79). A large, but unquantified, percentage of the female appointees during the 10-year period were in lower grade positions for which males traditionally did not apply (App. 79).

During the same 10-year period Ms. Feeney, whose suit was not filed as a class action, received a promotion to a position of importance within the Civil Defense Agency. She also passed four open competitive examinations for permanent positions in that period of time, but for one reason or another was not appointed to any of the positions she sought (App. 177-178). Ms. Feeney did not receive the highest score on those open competitive examinations.

In May of 1974, approximately one year after the period discussed above, Ms. Feeney also passed an open competitive examination for permanent positions classified as Administrative Assistant. Her score of 87 placed her in a five-way tie for seventeenth place on the relevant eligibility list (App. 77, 179). Application of the Massachusetts veterans' preference statute caused Ms. Feeney to be ranked seventieth among those eligi-

ble for appointment, but at the time the Agreed Statement of Facts was negotiated in this case, there were only requisitions from five appointing authorities for a total of seven administrative assistants. As a result of the temporary restraining order issued in this case on May 23, 1975, no permanent appointments have been made to those positions (App. 77, 179).

During the 10 years prior to the commencement of this action, literally thousands of eligible lists were prepared by those administering the Commonwealth's civil service system. Fifty of those lists were appended to the Agreed Statement (App. 80). On each of the 50 lists, female nonveterans who would have been certified as eligible for appointment, but for the application of veterans' preference, were ranked below veterans who received lower test scores. The lists do not purport to be representative of all such lists and no attempt was made to establish how many lists resemble those submitted (App. 80).

Based on the foregoing facts, Ms. Feeney challenges the Massachusetts civil service system which, like most other systems presently in effect in the United States, extends a hiring preference to wartime veterans. More specifically, she claims that application of the hiring preference statute discriminates against females seeking appointments to the Classified Official Service, one of two components of the Commonwealth's civil service system. Ms. Feeney points out that there were approximately 868,000 veterans residing in the Commonwealth when she commenced her action, of whom approximately 16,000 were females (App. 83), and she contends that the ineluctable effect of a ranking preference based on one's status as a veteran is the hiring of more males than females.

III. Operation of the Massachusetts Civil Service System.

Understanding Ms. Feeney's challenge also depends upon a comprehension of the way the Massachusetts civil service system operates. In Massachusetts, state law sets forth the requirements and procedures to be followed in filling certain positions, not only for the Commonwealth, but also its municipalities. *See generally*, Mass. Gen. Laws c. 31. At the time of Ms. Feeney's complaint only 60 per cent of the permanent positions at the state level were subject to civil service, while 40 per cent could be filled without reference to civil service requirements generally, or to veterans' preference in particular[7] (App. 72). The positions subject to civil service themselves fall into two categories: the Classified Official Service and the Classified Labor Service (App. 72). The positions to which plaintiff sought appointment in this case and the statistics which provide the underpinnings of her case relate to the Classified Official Service.

An applicant for a permanent position in the Classified Official Service initially is required to pass a competitive examination, designed to separate qualified from unqualified applicants (App. 72-73). Thereafter, successful candidates are placed on eligible lists from which appointments are ultimately made. Under veterans' preference, it is only after a veteran has passed the competitive examination that (s)he receives a

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[7] The range of positions not subject to civil service hiring systems includes many of the most desirable jobs in state government. Positions in the departments of the constitutional officers are excluded, as are legislative positions and other policy-making positions throughout state and local government. On occasion, Massachusetts lawmakers have excluded desirable positions from operation of civil service law specifically to expand the employment opportunities for women. *See, e.g.*, Mass. Gen. Laws c. 31, § 5, as amended by Mass. St. 1975, c. 134 (removing attorney's positions from the operation of the law).

preference, and that preference applies only to the order in which names are placed on the eligible list (App. 72).

Specifically, civil service law provides that qualified applicants be placed on the eligible list in the following order: (1) disabled veterans in order of their respective grades on the examination; (2) veterans in order of their respective grades on the examination; (3) widows of veterans and widowed mothers of veterans in order of their respective grades on the examination; (4) all other eligibles in order of their respective grades on the examination (App. 73).

When an appointing authority wishes to make a permanent civil service appointment it requisitions a certified eligible list for the specific position in question (App. 73). The Personnel Administrator then certifies candidates for appointment in accordance with the formula set forth in Civil Service Rule 14 (App. 74). In every instance that rule requires that more names are certified for appointment than there are vacancies. The appointing authority therefore has a measure of discretion in the actual hiring decision.[8] The appointing authority is required to make the appointment from among the names so certified, but is not required to appoint the person highest on the list (App. 74-75).

Summary of Argument.

The Massachusetts veterans' preference statute is a facially neutral law which may have an incidental adverse impact on

[8]On January 9, 1978, Rule 14 was amended to provide greater flexibility in the certification of eligible candidates. Under the new Rule 14, the Personnel Administrator may certify a number of eligibles from a minority group regardless of ranking, equal to the number normally certified to fill a requisition, if it is determined that previous hiring practices discriminated against that minority group on the basis of race, color, sex or national origin.

the employment opportunities of women, but which serves legitimate state interests. Its legislative history and this Court's interpretation of the Equal Protection Clause both establish that the positional preference extended by virtue of Mass. Gen. Laws c. 31, § 23, to those who served in the armed forces during time of war is a legitimate exercise of legislative power.

Appellants' first argument places the veterans' preference law in historical and sociological context. Massachusetts was an early leader in the provision of benefits to those who sacrificed during periods of war and, like the federal government and most of the states, it now extends preferential treatment in civil service employment to its returning soldiers and sailors. The class of persons benefitting from the preference is composed largely of males, but the preference is extended to all persons, regardless of gender, who have performed wartime military service. The legislative history of the Massachusetts statute amply demonstrates that the preference was designed to serve the clearly legitimate goals of rewarding individuals for their prior service, easing their present transition to civilian life and encouraging future patriotic service by others.

The form of veterans' preference legislation varies greatly from one jurisdiction to another, perhaps reflecting the complexities of attempting to balance the concept of a preference with the administrative desire for a civil service work force of maximum efficiency and the desire not to be overly restrictive of employment opportunities for nonveterans, including women. Balancing these various interests is uniquely a function of the legislative branch of government, and the rough accommodation of those interests worked by the Massachusetts General Court is entitled to judicial deference.

In their second argument the Appellants demonstrate that, in the process of making value-laden judgments as to the opti-

mal form of veterans' preference, the district court applied an impact-based standard in contravention of the principles articulated in *Washington* v. *Davis*, 426 U.S. 229 (1976). *Davis* stands for the proposition that a facially neutral governmental act will not be invalidated solely because of disproportionate impact. On remand the district court reasoned that the impact of the Massachusetts statute rendered the veterans' preference statute facially nonneutral. After demonstrating the speciousness of that reasoning, the Appellants attack the conclusion of the lower court that the veterans' preference law is an instance of intentional gender-based discrimination. The court relied almost exclusively on an analysis of the perceived impact of the statute, and it consistently overstated the effect of veterans' preference on women as a group and Helen B. Feeney as an individual. Any disadvantage women as a group experience as a result of the operation of the law is readily explainable in terms of the statute's noninvidious purpose to benefit veterans.

Appellants' third and final argument addresses the inadequacies in the equal protection analysis embodied in the original district court opinion. If, as suggested in that opinion, the veterans' preference law was not enacted for the purpose of disqualifying women from civil service appointments, then the district court should only have applied a rational basis test in assessing the validity of the statute. If, on the other hand, the statute does purposefully discriminate against women, the court should have looked to determine whether the statute's classifications are substantially related to the achievement of important governmental objectives. The district court never indicated which standards it was applying, but it should not have engaged in the search for a least restrictive alternative, which inevitably led it to an incomplete and inaccurate comparison of state and federal law. Mass. Gen. Laws c. 31, § 23, establishes a preference which differs only

in degree from other veterans' preference statutes, and all of those statutes rationally further the achievement of important gender-neutral government objectives. The veterans' preference statute is therefore a constitutional exercise of legislative power.

Argument.

I. The Massachusetts Veterans' Preference Statute is Part of a Comprehensive Legislative System Designed to Benefit Those who Served in the Military During Time of War and that System is Entitled to Judicial Deference.

A. *The Massachusetts Veterans' Preference Statute is a Reflection of Time-Honored Policies of Benefitting Those who Serve their Country in Periods of War.*

1. The Concept of Veterans' Preference is Widely Accepted.

In his second inaugural address delivered just before the close of the Civil War, Abraham Lincoln spoke of the need "to care for him who shall have borne the battle and for his widow, and his orphan." Lincoln's expression of the nation's concern for those individuals who served their country in times of strife was nothing novel; the provision of some form of benefits to wartime veterans has long been a hallmark of civilized nations. As former Chief Justice Field of the Massachusetts Supreme Judicial Court once noted, "[f]rom the earliest times most nations have conferred honors and offices upon those who have rendered distinguished service to the

State, particularly in war." *Brown* v. *Russell*, 166 Mass. 14, 17, 43 N.E. 1005, 1006 (1896).

What is particularly noteworthy about President Lincoln's statement is that it was made at a time when the federal government was enacting the first veterans' hiring preference law in the nation's history.[9] It also heralded the start of a 100-year period during which the number of federal civilian employees would be increased by 60 times. "Toward a Bureaucratic Society: Is Big Government Becoming Too Big?", 17 Public Administration News, No. 3, p. 2 (August, 1967). Since Lincoln's address, virtually every state in the country[10]

[9]The first enactment by Congress encouraging government employment of veterans was in the form of a resolution adopted March 3, 1865. Res. 27, 13 Stat. 571. It provided that persons honorably discharged from the military or naval service due to a disability incurred in the line of duty were to be preferred for appointment to "civil offices, provided they shall be found to possess the business capacity necessary for the proper discharge of the duties of such offices." *Id.*

[10]Appellants have attempted to catalogue the various state statutes in this note. For an earlier complete survey, *see*, State Veterans' Laws, Digests of State Laws Regarding Rights, Benefits and Privileges of Veterans and Their Dependents, House Committee on Veterans' Affairs, 91st Cong., 1st Sess. (1969).

Ala. Code § 36-26-15 (1975);
Alaska Stat. § 39.25.150(23) (1975);
Ariz. Rev. Stat. Ann. §§ 38-491, 38-492 (Cum. Supp. 1977-1978);
Ark. Stat. Ann. § 12-2319 (1968);
Cal. Const. Art. 7, § 6;
Cal. Govt. Code § 18973 (West Cum. Supp. 1978);
Col. Const. Art. 12, § 15;
Conn. Gen. Stat. Ann. § 5-224 (West Cum. Supp. 1977);
Del. Code Ann. Tit. 29, § 5935 (1974 & Cum. Supp. 1977);
Fla. Stat. Ann. § 295.08 (West Cum. Supp. 1978);
Ga. Const. Art. 3, § 7, par. 24;
Ga. Code Ann. §§ 89-928 to 929 (1971);
Hawaii Rev. Stat. § 76-103 (Supp. 1975);
Idaho Code §§ 65-502 to 506 (1976 & Cum. Supp. 1977);
Ill. Ann. Stat. c. 24, § 10-1-16 (Smith-Hurd Cum. Supp. 1978);

Ind. Code Ann. § 4-15-2-18 (Burns Cum. Supp. 1978);
Iowa Code Ann. §§ 19A.9(21), 70.1, 400.10 (West 1978 & West 1978 & West Cum. Supp. 1978-1979);
Kan. Stat. Ann. §§ 73-201, 75-2955 (1972);
Ky. Rev. Stat. §§ 18.212, 67A.240, 90.320 (1971 & Cum. Supp. 1978);
La. Const. Art. 10, § 10;
La. Rev. Stat. Ann. § 33:2416 (West 1966);
Me. Rev. Stat. Ann. Tit. 5, § 674 (1973 & Cum. Supp. 1978);
Md. Ann. Code Art. 64A, § 18(c) (Cum. Supp. 1977);
Mich. Comp. Laws Ann. §§ 35.401, 38.413 (Mich. Stat. Ann. §§ 4.1221, 5-1191(13) (Callaghan 1977, 1973));
Minn. Stat. Ann. § 43.30 (West Cum. Supp. 1978);
Miss. Code Ann. § 71-5-121 (1972);
Mo. Const. Art. 4, § 19;
Mo. Ann. Stat. § 36.220 (Vernon 1969);
Mont. Rev. Codes Ann. § 77-501(3) (Cum. Supp. 1977);
Neb. Rev. Stat. § 48-227 (1974);
Nev. Rev. Stat. §§ 281.060, 284.260 (1975);
N.H. Rev. Stat. Ann. § 283.4 (1977);
N.J. Stat. Ann. §§ 11:27-4, 11:27-5 (West 1976);
N.M. Stat. Ann. §§ 5-4-36.C, 74-5-1.B (Supp. 1975);
N.Y. Const. Art. 5, § 6;
N.Y. Civ. Serv. Law § 85 (McKinney 1973 & Cum. Supp. 1977-1978);
N.C. Gen. Stat. § 128-15 (1974);
N.D. Cent. Code § 37-19.1-02 (Supp. 1977);
Ohio Rev. Code Ann. § 124.23 (Page 1978);
Okla. Stat. Ann. Tit. 74, § 817 (West 1976);
Or. Rev. Stat. § 408.230 (1977);
Pa. Cons. Stat. Ann. §§ 7103, 7104 (Purdon 1976);
R.I. Gen. Laws § 36-4-19 (1969);
S.D. Comp. Laws Ann. § 3-3-1 (1974);
Ten. Code Ann. § 8-3206 (1973);
Tex. Rev. Civ. Stat. Ann. Art. 4413(31) (Vernon 1976);
Utah Code Ann. § 34-30-11 (Supp. 1977);
Vt. Stat. Ann. Tit. 20, § 1543 (1968);
Va. Code § 2.1-112 (1973);
Wash. Rev. Code Ann. §§ 41.04.010, 73.16.010 (Supp. 1977);
W. Va. Code §§ 6-13-1, 29-6-10 (Cum. Supp. 1978);
Wyo. Stat. §§ 19-119, 19-121 (Cum. Supp. 1975).

and several foreign jurisdictions[11] have followed the lead of the United States and enacted some form of veterans' preference hiring law.

The form of these statutes varies widely. At the time of the original district court opinion, 41 states and the federal government utilized a point preference system whereby a varying number of points were added to a veteran's examination score before the veteran was ranked against the pool of applicants.[12] Of these 41 states, eight and the federal government augmented the point preference by granting a positional preference for certain job categories or for disabled veterans.[13]

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[11] In 1944 the Senate Committee on Civil Service identified at least nine foreign countries which then extended hiring preferences to veterans: Austria, Belgium, Canada, England, France, Germany, Italy, Poland and Yugoslavia. Hearings on Preference in Employment of Honorably Discharged Veterans Where Federal Funds are Disbursed before the Senate Committee on Civil Service, 78th Cong., 2d Sess. (1944). But one recent commentator suggests that veterans' preference lacks currency in other nations. Blumberg, "De Facto and De Jure Sex Discrimination Under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment" 26 Buffalo L. Rev. 1, 9 n.41 (1976-1977).

[12] Alaska; Arizona; Arkansas; California; Colorado; Connecticut; Delaware; Florida; Georgia; Idaho; Illinois; Indiana; Kansas; Kentucky; Louisiana; Maine; Maryland; Michigan; Minnesota; Mississippi; Missouri; Montana; Nebraska; Nevada; New Mexico; New York; North Carolina; North Dakota; Ohio; Oklahoma; Oregon; Rhode Island; South Carolina; Tennessee; Texas; Virginia; Washington; West Virginia; Wisconsin; Wyoming.

[13] See, 5 U.S.C. § 3313(2)(a) (1970) (10 per cent or more disability); Cal. Govt. Code § 18971 (policemen and watchmen), § 18972 (specific services as designated) (West 1963); Ga. Code § 78-412 (1975) (positions in the Department of Veterans Service); Idaho Code § 65-506 (1976) (disabled veterans); Ind. Code § 19-35-3 (1971) (firemen); Mont. Rev. Codes Ann. § 77-501(2) (1966) (disabled veterans for jobs not requiring examinations); Neb. Rev. Stat. § 48-226 (1974) (jobs outside merit system); N.H. Rev. Stat. Ann. §§ 283:4, 283:6 (1966 & Supp. 1975) (public works jobs); N.D. Cent. Code § 37-19.1-02-4(f)(1) (Supp. 1975) (disabled veterans); R.I. Gen. Laws § 30-21-8 (disabled veterans), § 30-21-9 (custodial service) (1968).

Four of the 41 states gave preferences to veterans only if they scored equally with nonveterans on civil service examinations,[14] while some states gave tie-breaking preferences to veterans in addition to point preferences.[15] An additional seven states, plus Massachusetts, extended a positional preference to all veterans passing a civil service examination, where veterans' preference was applicable.[16] Almost all of these states extend veterans' preference to all available civil service jobs.[17]

These various statutes share a common purpose and a common historical background. Each was designed to reward, rehabilitate and reintegrate those who served the country during time of war. Given the fact that 98 per cent of the veterans in the country are men, each statute predictably benefits a class comprised largely of males at the comparative expense of a class including large numbers of females.

2. The History of Veterans' Preference in Massachusetts Displays a Noninvidious Desire to Benefit All Persons who Served the United States in Times of War.

While both state and federal legislatures have long since committed themselves to compensating the wartime sacrifices of veterans, historically Massachusetts was a leader in these ef-

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[14] Colorado; Iowa; Nevada; Texas.

[15] *See, e.g.*, Alaska; Kansas; Louisiana.

[16] New Jersey; Pennsylvania; South Dakota; Utah; Vermont; Washington.

[17] Alabama; Alaska; Arizona; Arkansas; California; Colorado; Connecticut; Delaware; Georgia; Indiana; Kansas; Louisiana; Maine; Maryland; Michigan; Minnesota; Mississippi; Missouri; Montana; Nevada; New Jersey; North Carolina; Oklahoma; Oregon; Pennsylvania; South Carolina; Tennessee; Utah; Vermont; Virginia; Washington; West Virginia; Wisconsin; Wyoming.

forts and retains that position today.[18] The very first veterans' benefit enacted in America was a pension for disabled soldiers provided by the Plymouth Colony in 1636. Laws of the Colony of New Plymouth (1636), *reprinted in* The Compact with the Charter and Laws of the Colony at 44 (1836). In succeeding years the provision of veterans' benefits mirrored the military experiences and evolving government structure of the Massachusetts Bay Colony. In 1744, during the War of Austrian Succession (King George's War), the Colony passed an act providing public funds for the support of those disabled during that war. Act of May 13, 1744, c. 2, § 14 [1744-1745] Acts and Resolves of the Province of Massachusetts Bay 1st Sess. 146.

Similarly, 1778 saw the passage of legislation designed to supply the necessities of life to families of soldiers participating in the Revolution. Act of February 8, 1778, c. 20, § 2 [1777-1778] Acts and Resolves of the Province of Massachusetts Bay 5th Sess. 775. These early efforts by Massachusetts lawmakers demonstrate the colonists' commitment to providing post-war support for those disabled during battle.

With the increase in public employment during the later part of the nineteenth century, the concept of a civil service hiring preference emerged. After the federal government enacted the first hiring preference at the end of the Civil War, a number of states followed suit. In 1884 Massachusetts

[18] The preference extended to veterans in placement on civil service eligible lists is one part of an extensive scheme of state aid to veterans. Those benefits include, for example, exemptions from certain license fees, Mass. Gen. Laws c. 101, § 24; c. 175, § 167A; exemption from motor vehicle registration fees, Mass. Gen. Laws c. 90, § 33; preferences for low rent and state-aided housing projects, Mass. Gen. Laws c. 121B, §§ 27, 32(f) and 34; exemption from tuition for certain courses at state colleges and universities, Mass. Gen. Laws c. 73, § 8A; c. 69, §§ 7 and 7A; retirement benefits, Mass. Gen. Laws c. 32, §§ 25(3), 56-58B; and a one-of-a-kind subsistence program, Mass. Gen. Laws c. 115, § 5.

enacted a statute designed to improve the state's public employment system which included a veterans' preference. Mass. Acts and Resolves (1884) c. 320, § 14(6).

Since these early efforts, almost all state legislatures have adopted veterans' preference.[19] These states and Congress have continuously reconsidered and refined the structure of the preferences. The federal legislative history is replete with amendments and revisions regarding the exact operation of the system and the degree of preference to be given. *See generally* U.S. Civil Service Commission, History of Veterans' Preference in Federal Employment 1869-1955 (1956), and 5 U.S.C. §§ 2108, 3309-3312, 3316 (1970). The various amendments reflect the complexities of the legislative policies behind veterans' preference and evidence the need to balance the concern for efficient government, the unique employment problems of wartime veterans and the competing employment interests of other identifiable groups. The Massachusetts experience is illustrative of the balancing process.

One decade after the enactment of c. 320 of the Acts of 1884, the General Court amended the statute by striking a requirement that "other qualifications must be equal" in order that the preference be given. Mass. Acts and Resolves (1895) c. 501. After setting forth the mechanics of the preference, the act specifically provided: "But nothing herein contained shall be construed to prevent the certification and employment of women." *Id.* at § 1. It further stated:

> Veterans who have made application for employment in the public service in accordance with [the civil service rules] shall be preferred for certification and appointment in preference to all other applicants not veterans, *except women*. . . . *Id.* at § 2 (emphasis supplied).

[19] *See* n.10, *supra*.

As far as the Commonwealth has been able to ascertain, these provisions mark the earliest efforts in the nation to reconcile the desire to improve employment opportunities for women with the impact of veterans' preference.

One year later, the veterans' preference section was rewritten, Mass. Acts and Resolves (1896) c. 517, reinserting the requirement that veterans pass a qualifying examination prior to being granted a preference.[20] By requiring a passing grade, the legislature assured that veteran applicants would be competent for state service, while maintaining the substance of the benefit. The provisions pertaining to the certification or employment of women quoted above were retained. *Id.*

Throughout the twentieth century virtually all major revisions of the Massachusetts veterans' preference occurred following periods of war. For example, in 1922 as a direct response to the special needs of disabled World War I veterans, a special preference category was created for disabled veterans so that, if qualified, they would be employed prior to all others. Mass. Acts and Resolves (1922) c. 463. Further revisions occurred after World War II, Mass. St. 1949, c. 642, § 1; the Korean Conflict, Mass. St. 1954, c. 627; and during the Vietnam Conflict, Mass. St. 1965, c. 875; Mass. St. 1968, c. 531, § 1.

The Massachusetts history also convincingly demonstrates that women with wartime service have always received veterans' benefits, including preferential civil service employment rights, on an equal footing with their male counterparts. On August 12, 1918, 10,000 women were admitted to the

[20] "The distinguishing and saving difference of the new law is that every appointee, be he veteran or not, must pass his examination; he must exceed that minimum which the Civil Service Rules fix as a sufficient test of knowledge." "Preference of Veterans in the Massachusetts Civil Service," 10 Harv. L. Rev. 236 (1896).

Navy and Marine Corps and served respectively as "Yeomanettes" and "Marinettes." Those women received veterans' preference. Mass. Acts and Resolves (1919), c. 150; 5 *Op. Atty. Gen.* 500 (Mass. 1920). The 1943 revision of the veterans' preference law contained a specific provision extending that benefit to women who were serving in the newly created Women's Army Auxiliary Corps (WAACS) or the Women Accepted for Volunteer Emergency Services (WAVES). Mass. St. 1943, c. 194.

Again, after the Korean war, the Massachusetts statutes were revised in a manner which removed any doubt that women with wartime military service are entitled to equality of preference. This time, rather than merely amend the civil service laws, the legislature amended the provisions of Massachusetts law pertaining to uniformity of definitions of statutory words by providing a specific, gender-neutral definition of the word "veteran". Mass. St. 1954, c. 627, § 1. Mass. Gen. Laws c. 4, § 7 (43), still defines a veteran in such sex-neutral terms. A "veteran" is:

> *any person, male or female,* including a nurse, (*a*) whose last discharge or release from his wartime[21] service, as defined herein, was under honorable conditions and who (*b*) served in the army, navy, marine corps, coast guard, or air force of the United States for not less than ninety days active service, at least one day of which was for wartime service, provided, that any person who so served in wartime and was awarded a service-connected disability or a Purple Heart, or who died in such service under conditions other than dishonorable, shall be deemed to be a

[21] "Wartime service" is itself defined to mean service performed by a "Spanish War veteran," a "World War I veteran," a "World War II veteran," a "Korean veteran," a "Vietnam veteran," or "a member of the WAAC." *Id.* (App. 222-224).

veteran notwithstanding his failure to complete ninety days of active service. (Emphasis supplied.) (App. 222-224.)

The 1954 amendments substantially revised the veterans' preference statute and, apart from special reformatory amendments,[22] the present system is virtually identical to that created by those revisions. Its operation is summarized in the Statement of the Case at pp. 11-12, *supra*.

3. The Goals of Veterans' Preference are Legitimate.

The present Massachusetts veterans' preference statute, like its historic antecedents and its counterparts in other jurisdictions, is designed to serve well-recognized significant purposes: (1) to reward those who have sacrificed in the service of their country; (2) to assist veterans in their readjustment to civilian life; and (3) to encourage patriotic service. The legitimacy of these legislative goals is beyond cavil. The Massachusetts Supreme Judicial Court has repeatedly spoken of the compelling nature of those interests in such cases as *Hutcheson* v. *Director of Civil Service*, 361 Mass. 480, 281 N.E. 2d 53

[22] With the exception of the amendments described in note 1, *supra*, there have been only two substantive amendments to § 23 since 1954. The first, Mass. St. 1971, c. 219, deleted the underscored portions of the following language: "Upon receipt of a requisition *not especially calling for women*, names shall be certified from such lists according to the method of certification prescribed by the civil service rules *applying to civilians*." This change eliminated language referring to special requisition lists classified along lines of gender which were no longer in use and eliminated the last vestiges of disparate treatment of similarly situated males and females in the civil service system. The second amendment removed the absolute preference for disabled veterans in appointment but added an absolute preference in retention. Mass. St. 1971, c. 1051, § 1. The amendment had no effect on disabled veterans' preferred placement on the eligible list.

(1972); *Opinion of the Justices*, 190 Mass. 611, 77 N.E. 820 (1906); and *Brown* v. *Russell*, 166 Mass. 14, 43 N.E. 1005 (1896). Furthermore, courts from other jurisdictions which have considered the problem have universally acknowledged and approved the basic purposes served by the many different veterans' preference statutes.[23] In fact, this Court itself has spoken approvingly of the purposes underlying veterans' preference legislation in *Johnson* v. *Robison*, 415 U.S. 361 (1974), and *Mitchell* v. *Cohen*, 333 U.S. 411 (1948). Even the district court in the case at bar, while holding the Massachusetts statute to be unconstitutional, concedes the underlying validity of these goals. *Anthony* v. *Massachusetts*, 415 F. Supp. 485, 496-497 (D. Mass. 1976) (App. 213-215).

The statute's history, its purposes and its operation demonstrate that the provisions of veterans' preference is part of a general nationwide effort to reward, rehabilitate and reintegrate veterans who have served their country in time of war. The evolution of the Massachusetts statute and the variations with respect to veterans' preference enacted by the

[23] *Rios* v. *Dillman*, 499 F. 2d 329 (5th Cir. 1974); *White* v. *Gates*, 253 F. 2d 868 (D.C. Cir.), *cert. denied*, 356 U.S. 973 (1958); *Russell* v. *Hodges*, 470 F. 2d 212 (2d Cir. 1972); *Branch* v. *DuBois*, 418 F. Supp. 1128 (N.D. Ill. 1976); *Feinerman* v. *Jones*, 356 F. Supp. 252 (M.D. Pa. 1973); *Koelfgen* v. *Jackson*, 355 F. Supp. 243 (D. Minn. 1972), *aff'd mem.* 410 U.S. 976 (1973); *Ballou* v. *State Department of Civil Service*, 148 N.J. Super. 112, 372 A. 2d 333 (1977); *Commonwealth ex rel. Graham* v. *Schmid*, 333 Pa. 568, 3 A. 2d 701 (1938); *State ex rel. Kangas* v. *McDonald*, 188 Minn. 157, 246 N.W. 900 (1933); *People ex. rel. Sellers* v. *Brady*, 262 Ill. 578, 105 N.E. 1 (1914); *Goodrich* v. *Mitchell*, 68 Kan. 765, 75 Pac. 1034 (1904). The language of *Rios* is typical. There the court noted that the objectives of veterans' preference included: encouraging citizens to serve their country in time of war, rewarding those who do serve and aiding in the rehabilitation and location of a veteran whose normal lifestyle has been disrupted by military service. *Rios* v. *Dillman*, *supra* at 332. It is noteworthy that the litany of purpose varies little from one case to another and that the validity of these goals is assumed rather than deduced. Apparently the worthiness of the purposes has never seriously been disputed.

several states and by Congress serve to underscore the fact that there is still no agreement as to the optimal form of a veterans' preference law. Accordingly, in the absence of a clear constitutional violation, judgments as to the form of a particular veterans' preference law should continue to be made by each jurisdiction based on an assessment of its own particular needs and resources.

B. *The Desirability of Veterans' Preference is a Complex Question Demanding Legislative Rather than Judicial Resolution.*

In recent years veterans' preference has been increasingly subject to criticism and attack. Some suggest that there is less concern for the welfare of returning Vietnam war veterans, who are perceived as having "lost" an unpopular war. *See, e.g.*, P. Starr, *The Discarded Army: Veterans After Vietnam* (1973). In some instances the source of the opposition comes from women's groups, who see veterans' preference as an obstacle in their quest to obtain meaningful governmental employment opportunities for females.[24] At other times the desire to cut back on preference for veterans may be traced to the desire of government managers to increase the flexibility and competence of their work force.[25] Whatever the reasons or the sources for the criticism, Appellants suggest that the legislative branch of government is the only appropriate forum to weigh the competing social values affected by veterans' preference to meet the particular needs of the time.

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[24] *See, e.g.*, League of Women Voters of Massachusetts, *The Merit System in Massachusetts* (1961).

[25] President's Special Message to Congress on Civil Service Reform, 124 Cong. Rec. H. 1661 (daily ed. March 2, 1978), *reprinted in* [1978] U.S. Code Cong. & Adm. News 561, 565.

There are many diverse and oftentimes conflicting factors which must play a role in any decision as to the form of a veterans' preference statute. First and foremost among them is the unique employment problems which face veterans returning from the extraordinary disruption in their lives caused by wartime military service. The "special problems of veterans" alluded to in the original lower court opinion are not an illusion. *Anthony* v. *Massachusetts*, 415 F. Supp. 485, 497 (D. Mass. 1976) (App. 215). In every year since 1971 the national unemployment rate for younger veterans has significantly exceeded the unemployment rates for comparably aged nonveterans in general and nonveteran females in particular. These problems do not appear to have abated with the passage of time; the unemployment rate for younger veterans hovered around the 20 per cent level during the three calendar years between 1974 and 1976, and the level for minority veterans during the same period consistently approximated around 30 per cent. U.S. Department of Labor, Employment and Training Administration, Employment and Training Report of the President (Tables A-8, A-19) (1977). During that period the Commonwealth of Massachusetts was ranked twenty-seventh in placing Vietnam-era veterans in jobs. S. Rep. No. 94-1293, 94th Cong., 2d Sess. (1976). In a slightly earlier period the Commonwealth was ranked twenty-eighth in the placement of veterans of all ages. Hearings on Veterans' Unemployment Problems, S. 760 and Related Bills before the Subcommittee on Readjustment, Education and Employment of the Senate Committee on Veterans' Affairs (Graph at 150-152), 94th Cong., 1st Sess. (1975). One can only speculate what the employment picture would have been for veterans had there not been a civil service preference in effect during that period.

The problems of readjustment which contributed to high nationwide unemployment rates for veterans have been ex-

acerbated in Massachusetts by a constrictive regional economy. The period just prior to the original district court opinion is illustrative of the point. In the first quarter of 1975, nationwide unemployment figures reached 8.3 per cent. U.S. Department of Labor, Bureau of Labor Statistics, Labor Force Developments: First Quarter, Table 1 (1975). In the New England states unemployment in May 1975 was 11.4 per cent, well above the national average, and in Massachusetts the May 1975 unemployment rate was 12.6 per cent. U.S. Department of Labor, Bureau of Labor Statistics, News, 2 (July 3, 1975). Thus, employment opportunities for veterans who had been away from the civilian work force for a period of years were minimal at best.

To be sure, employment opportunities for women and others were also restricted, but it is uniquely a legislative function to establish hiring priorities and to promote alternative methods of ensuring job opportunities for females. It appears that Massachusetts was pursuing those alternatives in the period directly preceding commencement of this action. It was in 1975, for instance, that various governmental lawyer's positions were removed from the operation of civil service law to enhance the likelihood of women being hired. Mass. St. 1975, c. 134. It was also in 1975 that the General Court took the final legislative action necessary to place the so-called "Equal Rights Amendment" before the Massachusetts electorate, and it was in the same year that the state adopted an affirmative action program for the state work force designed to assure that women obtain a proportional share of state jobs at all levels. Mass. Exec. Order 116 (1975).

The Appellants submit that the Massachusetts General Court alone had the institutional competence to reconcile all these competing interests and to take the steps necessary to address employment problems generally. The state legislature had the requisite knowledge of the staffing needs of the government bodies drawing their employees from the civil service system. It had the intimate awareness of the state's resources, economic conditions and human needs so necessary to a judgment on veterans' preference. As Justice Powell once observed, in an analogous situation, federal courts should be "unwilling to assume for [themselves] a level of wisdom superior to that of legislators" when, as here, the legislative scheme "has constituted a 'rough accommodation' of interests in an effort to arrive at practical and workable solutions. . . ." *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 55 (1973). *See also, City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976), and *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963).

In this case principles of federalism and separation of powers should have dictated a degree of deference to a legislative determination which concededly serves legitimate governmental interests and was not "enacted for the purpose of disqualifying women from receiving civil service appointments." *Anthony* v. *Massachusetts*, 415 F. Supp. 485, 495 (D. Mass. 1976) (App. 212). However, the methodology of the district court was anything but deferential. On the contrary, the district court consistently stretched constitutional doctrine and made value-laden judgments as to the wisdom of the Massachusetts veterans' preference statute.

II. The District Court Decision on Remand Conflicts with this Court's Opinion in Washington v. Davis.

A. *The Lower Court Did Not Adequately Reconsider the Results of its Original Opinion.*

The clearest illustration of the result-oriented nature of the district court's treatment of the Massachusetts veterans' preference statute emerges from a comparison of the two district court opinions in this case. The first opinion was rendered in March of 1976, at a time when many lower courts apparently subscribed to the theory that proof of a disproportionate impact was sufficient to establish a violation of the Equal Protection Clause. *See, Washington* v. *Davis*, 426 U.S. 229, 244-245 n.12 (1976), and cases cited therein. In its original opinion, the court found that "[f]acially, the [Massachusetts] Veterans' Preference is open to both men and women" and that it "was not enacted for the purpose of disqualifying women from receiving civil service appointments." *Anthony* v. *Massachusetts*, 415 F. Supp. 485, 498, 495 (D. Mass. 1976) (App. 219, 212). Nevertheless, the district court concluded that Mass. Gen. Laws c. 31, § 23, violated the Equal Protection Clause of the Fourteenth Amendment, primarily because it purportedly had a devastating impact on employment opportunities for women.

Shortly after that decision was issued, this Court rendered its decision in *Washington* v. *Davis*, 426 U.S. 229 (1976). That case firmly established the principle that a law or other state action which is neutral on its face does not violate the constitution solely because it has a disproportionate impact on a discrete and insular minority. On the contrary, this Court ruled that while impact alone might suffice in a statutory claim brought under Title VII of the Civil Rights Act of

1964,[26] proof of a discriminatory purpose is a necessary precondition of a successful equal protection challenge of a facially neutral state action.

Given the apparent inconsistencies between the statements contained in the original district court opinion and the standards articulated in *Davis*, *supra*, this Court followed its "usual practice in [such] situation[s]" by vacating the judgment below and "remanding in order to permit the lower court to reconsider its ruling" in light of the Supreme Court's intervening and superceding decision. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 272 (1977) (White, J., dissenting). *See also, Bell* v. *Maryland*, 378 U.S. 226 (1964).

On remand, the district court simply reversed its earlier inconsistent statements pertaining to facial neutrality and the statute's purposes. Where once the court had spoken of the fact that veterans' preference was open to both men and women, on remand the district court noted that Mass. Gen. Laws c. 31, § 23, "is not facially neutral." *Feeney* v. *Massachusetts*, 451 F. Supp. 143, 147 n.7 (D. Mass. 1978) (App. 260). Whereas the court had once offered the observation that the veterans' preference law was not enacted for the purpose of denying civil service appointments to females, *Anthony* v. *Massachusetts*, 415 F. Supp. 485, 495 (D. Mass. 1976) (App. 212), now it opined that the intent of the Commonwealth in passing Mass. Gen. Laws c. 31, § 23, was to benefit veterans

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[26] The challenge to the Massachusetts veterans' preference statute is exclusively a constitutional, as opposed to a Title VII, challenge. In fact, the Massachusetts statute is immune from a Title VII attack by virtue of 42 U.S.C. § 2000e-11, which provides, in part:

> Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

"by subordinating employment opportunities of its women."[27] *Feeney* v. *Massachusetts*, 451 F. Supp. 143, 149-150 (D. Mass. 1978) (App. 264).

These dramatic and contradictory shifts in the language of the district court opinions defy logic and can only be attributed to a socially motivated desire to preserve the earlier invalidation of Mass. Gen. Laws c. 31, § 23. This is particularly true in light of the fact that there was no new evidence adduced during the proceedings on remand. It therefore appears that the district court did not reconsider the result of its earlier opinion as much as it considered how to rewrite the opinion to preserve the result. Both the conclusion that the veterans' preference law is not facially neutral and the finding of intentional gender-based discrimination are based on the application of incorrect standards of law.

B. *The District Court Erred in Concluding that the Veterans' Preference Statute is Not Facially Neutral.*

The starting point for the district court's analysis on remand was the assertion that "[t]he factual underpinning in this case is entirely different" from that in *Washington* v. *Davis*, 426 U.S. 229 (1976), *Feeney* v. *Massachusetts*, 451 F. Supp. 143, 147 (D. Mass. 1978) (App. 259), since the veterans' preference statute was perceived to be "anything but an impartial, neutral policy" of selecting civil service applicants for certification and appointment. *Feeney* v. *Massachusetts*, 451 F. Supp. 143, 147 n.7 (D. Mass. 1978) (App. 259). Facial neutrality is particularly significant because it triggers the search for intentional discrimination required by *Davis*.

[27] The concurring justice, Campbell, J., had a dissimilar view as to the issue of discriminatory intent, noting that "[t]he statute can likewise be said not to be based on a discriminatory intent, in the sense that no one thinks that it was enacted as a pretext to harm women." 451 F. Supp. at 150 n.* (App. 266).

Even a cursory reading of the challenged statute reveals that in all relevant aspects[28] the law is facially neutral in terms of gender. Mass. Gen. Laws c. 31, § 23, bestows employment preferences on veterans at the expense of nonveterans, but it draws no line based on the sex of civil service applicants. Any argument that the word "veteran" is sex-specific is negated by the definition of the phrase appearing in Mass. Gen. Laws c. 4, § 7(43). It includes "any person, male or female" who otherwise meets the criteria set forth in the statute (App. 222).[29] Thus, as the lower court previously acknowledged, "[f]acially, the Veterans' Preference is open to both men and women." *Anthony* v. *Massachusetts*, 415 F. Supp. 485, 498 (D. Mass. 1976) (App. 219).

In attempting to distinguish this case from *Davis* (App. 258), the district court apparently confused the analysis of the veterans' preference statute on its face with the analysis of its effects and its background. Recent decisions of this Court amply illustrate that, in assessing facial neutrality, lower courts must confine their inquiry to whether the statute draws lines based on gender as such. *Geduldig* v. *Aiello*, 417 U.S. 484 (1974); *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976); *City of Los Angeles, Department of Water and Power* v. *Manhart*, 435 U.S. 702 (1978). The Court's treatment of pregnancy, which unlike veterans' status is clearly a gender-linked condition unique to women, is particularly noteworthy:

[28] At the time of the initiation of this action, preferences were also extended to "widows" and "widowed mothers" of veterans. Mass. Gen. Laws c. 31, §§ 23B, 24. These preferences were obviously gender-specific, but they did not operate to the detriment of Helen Feeney or of women as a class. These provisions have since been made gender-neutral, by making the preference applicable to "surviving spouses" and "surviving parents." Mass. St. 1977, c. 815.

[29] The definition is set forth in full at pp. 23-24, *supra*.

The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition — pregnancy — from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in [*Reed* v. *Reed*, 404 U.S. 71 (1971)] and [*Frontiero* v. *Richardson*, 411 U.S. 677 (1973)]. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups — pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes. *Geduldig* v. *Aiello*, *supra*, at 496-497 n.20.

The status of veterans, like the condition of pregnancy, is objectively identifiable. Unlike pregnancy, however, it is not unique to persons of one sex. While the California program considered in *Geduldig* divided recipients into two groups, one

of which was comprised exclusively of females, the Massachusetts preference creates two classes, both of which include significant numbers of men and women. Under the standards articulated in *Geduldig*, therefore, one can hardly assert that Mass. Gen. Laws c. 31, § 23, is anything but facially neutral. In fact, each court which has recently assessed the constitutionality of veterans' preference legislation has recognized those laws to be gender-neutral. *Bannerman* v. *Department of Youth Authority*, 436 F. Supp. 1273 (N.D. Cal. 1977); *Branch* v. *DuBois*, 418 F. Supp. 1128 (N.D. Ill. 1976); *Ballou* v. *State Department of Civil Service*, 148 N.J. Super. 112, 372 A. 2d 333 (1977).

Apparently the district court found that the Massachusetts statute was not facially neutral because of its relationship to overly restrictive federal statutes and military regulations which, according to the district court, served to limit the opportunities for women to serve in the military in time of war. The lower court's conclusion that the facial neutrality of the Massachusetts statute must be analyzed against a backdrop of federally-imposed, gender-based restrictions on the composition of the armed forces is fallacious for a number of reasons. First, of course, is the fact that the Commonwealth cannot be held legally responsible for the effects of federal military policy. *Cf. Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 93, 94 n.6 (1973) (employer not responsible for onerous naturalization policies imposed by Congress); *N.A.A.C.P.* v. *Lansing Board of Education*, 559 F. 2d 1042, 1049 (6th Cir. 1977) (school officials not responsible for segregative housing patterns).

Second, the allegedly restrictive federal regulations did not adversely affect the single plaintiff in this case or the class of women as whole. Helen B. Feeney, like so many of her contemporaries, never sought to enter the armed forces of the

United States (App. 83). Apparently the reasons for the lack of women in the military were social in nature and have nothing to do with arbitrarily set quotas based on stereotypical views of the role of females in the military (App. 180). The fact is that quotas have never served as an actual cap on female participation during times of war, because the quotas have never been met. Office of the Assistant Secretary of Defense, Manpower, Reserve Affairs, and Logistics: Use of Women in the Military, Background Study, May, 1977; M. Binkin & S. Bach, *Women and the Military*, 10, 11 (1977). For whatever reason, significant numbers of women have simply never volunteered for wartime service.

The documented reluctance of females to join the military in wartime is illustrative of the third point; if there is gender-based discrimination inherent in federal regulations, it is discrimination against males. Wartime service, especially service in actual combat, is not a benefit bestowed on males in violation of the concept of equal protection. It is instead an obligation imposed on males who are subject to conscription under the Selective Service Act.[30] When males mounted direct sex discrimination challenges to the draft during the Vietnam war and its aftermath, the federal judiciary virtually uniformly rejected those challenges. *See, e.g., United States* v. *Reiser*, 394 F. Supp. 1060 (D. Mont. 1975), *rev'd*, 532 F. 2d 673 (9th Cir. 1976); *United States* v. *St. Clair*, 291 F. Supp. 122 (S.D. N.Y. 1968); *Suskin* v. *Nixon*, 304 F. Supp. 71 (N.D. Ill. 1969); *United States* v. *Cook*, 311 F. Supp. 618 (W.D. Pa. 1970);

[30] In fiscal 1970 draftees represented 70 per cent of all combat soldiers, and 43 per cent of all combat fatalities. P. Starr, *The Discarded Army: Veterans After Vietnam*, p. 10 (1973). The Army in particular came to rely heavily on draftees. In 1969, 62 per cent of all Army combat deaths were draftees. Hearings on the Extension of the Draft and Bills Related to the Voluntary Force Concept and Authorization of Strength Levels before the House Committee on Armed Services, 92d Cong., 1st Sess. (1971), p. 172.

United States v. *Dorris*, 319 F. Supp. 1306 (W.D. Pa. 1970). Now, however, the district court indirectly suggests that the same statutes are sufficiently violative of the Equal Protection Clause to taint the Massachusetts veterans' preference law and render it "not facially neutral." *Feeney* v. *Massachusetts*, 451 F. Supp. 143, 147 n.7 (D. Mass. 1978) (App. 259-260 n.7).

The significance of the district court's error in holding that Mass. Gen. Laws c. 31, § 23, is not facially neutral cannot be overstated, because that error infects the balance of the court's opinion. The majority opinion clearly indicates that the standards to be used in assessing neutral and nonneutral statutes differ markedly. Specifically, the court concedes that "foreseeability of impact" would not be an adequate standard in cases involving facially neutral statutes. *Feeney* v. *Massachusetts*, 451 F. Supp. 143, 147 n.7 (D. Mass. 1978) (App. 259-260 n.7). Since foreseeability is one of the keys to the lower court finding on intentional discrimination in this case, *see* Part IIC, *infra*, the question of the facial neutrality of the statute may well be outcome-determinative.

Concededly, the benefits extended by Mass. Gen. Laws c. 31, § 23, are bestowed on a class composed largely of males, but it is a class which technically and in fact is open to persons of both sexes. Furthermore, the fact that the application of the statute results in benefits to more persons of one sex than the other can never obviate its facial neutrality. In *Davis*, *supra*, this Court held that disproportionate impact alone will not invalidate a facially-neutral statute. It is pure sophistry to argue that a statute is not facially neutral, and that *Davis* does not apply, because of its impact. This Court should not allow such circular reasoning to avoid the holding in *Davis*.

C. *The District Court Improperly Concluded that the Veterans' Preference Statute is an Instance of Intentional Gender-Based Discrimination.*

It is by now axiomatic that a facially neutral governmental act will not be held violative of the Equal Protection Clause in the absence of a showing of purposeful discrimination. *Washington* v. *Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

By stating that only intentional discrimination against minority groups violates the Constitution, this Court has shifted the focus in constitutional litigation from an assessment of discriminatory effect to a probing inquiry into motives. Disproportionate impact is not irrelevant to the inquiry, "but it is not the sole touchstone of an invidious . . . discrimination forbidden by the Constitution." *Davis*, 426 U.S. at 242.[31] Rather, courts must conduct "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266.

In *Arlington Heights*, this Court enunciated a nonexhaustive list of circumstantial and direct evidentiary factors which are "subjects of proper inquiry in determining whether . . . discriminatory intent existed." *Arlington Heights*, 429 U.S. at 268.[32] By enunciating and applying those evidentiary factors,

[31] In *Arlington Heights*, this Court did note that, in "rare" cases, discriminatory impact alone can be determinative. But, "[a]bsent a pattern as stark as that in *Gomillion* [v. *Lightfoot*, 364 U.S. 339 (1960)] or *Yick Wo* [v. *Hopkins*, 118 U.S. 356 (1886)], impact alone is not determinative, and the Court must look to other evidence." *Arlington Heights*, 429 U.S. at 266. *See also Castaneda* v. *Partida*, 430 U.S. 482, 495 (1977).

[32] It is significant to note that in articulating these evidentiary factors this Court opened up the inquiry into the subjective motivation of individual legislators, an area previously left untouched by the courts. *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87 (1810); *Palmer* v. *Thompson*, 403 U.S. 217 (1971).

this Court signalled that discriminatory intent was not to be lightly inferred.[33] Indeed, the decisions of this Court subsequent to *Davis* indicate that an inference of discriminatory intent must be substantiated in fact. *Austin Independent School District* v. *United States*, 429 U.S. 990 (1976); *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977); *School District of Omaha* v. *United States*, 433 U.S. 667 (1977); *Brennan* v. *Armstrong*, 433 U.S. 672 (1977).[34]

In this case the district court purported to look to evidence other than impact and to apply a "totality of the relevant facts" test in its search for intentional discrimination. *Feeney*, 451 F. Supp. 143 at 147 (App. 259). The test appears to be dervied from the "nonexhaustive" series of six standards enumerated in *Arlington Heights*, 429 U.S. at 266-268. Significantly however, only one of those six specific standards was considered by the district court on remand, and that was the impact of the challenged action. More importantly, the district court ignored the statement in *Arlington Heights* that in order to justify an inference of intent, the disproportionate impact must be "unexplainable on grounds other than race." *Id.*

[33] Several commentators have recognized that principles of federalism and separation of powers require that proof of discriminatory intent in constitutional cases be supported by a significant evidentiary showing. *See*, Note, "Developments in the Law: Equal Protection," 82 Harv. L. Rev. 1065, 1093-1094 n.101 (1969); A. Bickel, *The Least Dangerous Branch* 216; P. Brest, "Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive," 1971 Sup. Ct. Rev. 95, 129-130 (advocating a standard of clear and convincing evidence).

[34] The significance of these remands and the implications as to the plaintiff's burden have been noted by some commentators. Blumberg, "De Facto and De Jure Sex Discrimination Under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment," 26 Buffalo L. Rev. 1 (1976); "Proof of Racially Discriminatory Purpose Under the Equal Protection Clause: *Washington* v. *Davis*, *Arlington Heights*, *Mt. Healthy*, and *Williamsburgh*," 12 Harv. Civ. Rights Civ. Liberties L. Rev. 725 (1977).

at 266. On close scrutiny this totality of the circumstances test used by the district court in its search for invidious purpose is merely a facade behind which the court once again engaged in the now-outmoded impact analysis which characterized its earlier opinion.

While declaring the Massachusetts veterans' preference statute unconstitutional, the district court acknowledged that "the prime legislative *motive* of the challenged statute, that of rewarding public service in the military, was worthy." (Emphasis supplied.) *Feeney* v. *Massachusetts*, 451 F. Supp. 143, 145 (D. Mass. 1978) (App. 254). The district court noted elsewhere that "the Commonwealth had a salutary *motive*" (emphasis supplied), *Feeney* v. *Massachusetts*, 451 F. Supp. 143, 150 (D. Mass. 1978) (App. 264), and that the veterans' preference statute "was not enacted for the *purpose* of disqualifying women from receiving civil service appointments." (Emphasis supplied.) 415 F. Supp. at 495 (App. 212). Yet, incredibly, the district court also declared that the "intent" of the veterans' preference statute was to "subordinat[e] employment opportunities of its women." *Feeney* v. *Massachusetts*, 451 F. Supp. 143, 149-150 (D. Mass. 1978) (App. 264).

This distinction drawn between "motive," "purpose," and "intent" must be viewed as sophistry. *Webster's New Twentieth Century Dictionary*, Unabridged Second Edition, defines "motive" as an "intention" that causes some persons to do something. In turn, it defines "intent" as a "purpose" and defines "purpose" as an "intention."

This Court has never distinguished between a legislature's "intent," "motive" and "purpose" in deciding whether a statute is discriminatory. Rather, in the context of determining a legislature's reasons for passing a statute, this Court has properly used the terms interchangeably. In *Arlington Heights*, 429 U.S. at 265-266, this Court noted:

> [I]t is because legislators . . . are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. . . . When there is a proof that a discriminatory *purpose* has been a *motivating* factor in the decision, this judicial deference is no longer justified. (Emphasis supplied.)

Elsewhere in the *Arlington Heights* opinion, this Court concluded that "[p]roof of racially discriminatory *intent* or *purpose* is required to show a violation of the Equal Protection Clause." (Emphasis supplied.) *Id.* at 265. In *Jefferson* v. *Hackney*, 406 U.S. 535, 548 (1972), this Court rejected allegations of racial discrimination where acceptance of appellant's constitutional theory rendered suspect differences in treatment, however lacking in racial "motiviation." In *Davis*, 426 U.S. at 240, this Court noted that the challengers in *Wright* v. *Rockefeller*, 376 U.S. 52 (1964), did not prevail because they failed to prove that the New York legislature was "motivated" by racial considerations. However one categorizes the inquiry, the Massachusetts veterans' preference statute was not intended, designed or motivated by a desire to harm women.

1. The Exclusionary Effect of the Veterans' Preference Statute does Not Give Rise to an Inference of Intentional Gender-Based Discrimination.

This Court has recognized that the impact of a governmental act is probative on the issue of intent, but that it is conclusive only in the rarest of cases. *Arlington Heights*, 429 U.S. at 266. Here the lower court has grossly overstated the impact of veterans' preference on women in general and Helen B. Feeney in particular in an obvious attempt to make this case

fall into the latter category. The attempt falls short. The Massachusetts veterans' preference statute does not erect an insurmountable barrier to women seeking employment within the official service of the Commonwealth. The district court was able to conclude that such a barrier exists and that the impact of the statute was devastating only because it was willing to make inappropriate comparisons based on incomplete figures and to attach significance to unquantified and unsubstantiated statements of fact. If the court had properly assessed the relevant evidence before it, it would have concluded that the impact of veterans' preference is insufficient to support an inference of intentional gender-based discrimination.

Recent decisions of this Court indicate that the appropriate statistical comparison in an employment discrimination case is between the composition of the work force and that of the relevant labor market. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977).[35] In the case at bar the lower court made quite a different comparison. It found a disproportionate impact almost exclusively on the basis of an analysis of the gender of the appointees to positions in the official service between 1963 and 1973. During the relevant period a total of 47,005 such appointments were made. If those appointed were to be classified on the basis of both

[35] The fact that the cases cited in text arose under Title VII rather than under the Constitution is of little or no relevance. First, the quest for impact is the same in both species of cases and it is only the weight afforded to impact after it is found which differentiates the two. Second, in *Davis*, a significant evidentiary factor was a comparison between the percentage of young black police recruits and comparably aged young blacks in metropolitan Washington, D.C. 426 U.S. at 235. Finally, in the context of jury selection, this Court has discerned a discriminatory impact of constitutional dimension based on a comparison between the percentage of Mexican-Americans serving on juries and those eligible for selection. *Castaneda* v. *Partida*, 430 U.S. 482 (1977).

gender and veteran status, the single largest class of such appointees would consist of nonveteran females. During the 10-year period, 19,837 nonveteran females received permanent appointments (42.2 per cent of all those appointed) while veteran males received 14,476 (30.2 per cent) of the appointments. Appointments of nonveteran males numbered 12,318 (26.2 per cent) and only 374 (.8 per cent) veteran females were hired (App. 79). In light of the statistical advantages enjoyed respectively by nonveterans over veterans and nonveteran females over veteran males, it would appear to be difficult at best to argue that veterans' preference results in a grossly disproportionate adverse impact on female applicants. Nevertheless, noting that 57 per cent of those appointed in the 10-year period were males and that 43 per cent were females, the district court found that the impact of veterans' preference was so devastating in Massachusetts that it was indicative of discriminatory intent. Because the analysis failed to consider the percentages of men and women available for work in Massachusetts, its value is suspect.

Had the district court made the appropriate comparison in this case, it would have been compelled to reach precisely the opposite conclusion. Based on the statistical analysis prepared by the United States Department of Labor, one can conclude that the percentage of women in the labor force throughout the nation increased every year from 1963 through 1974, rising from a low of 33.2 per cent to a high of 38.5 per cent in 1974. U.S. Department of Labor, Employment and Training Administration, Employment and Training Report of the President (Table A-1) (1977). The United States Census figures for 1970 indicate that females comprised 39.9 per cent of the labor forces of the Commonwealth. 1970 Census, General Social and Economic Characteristics, Massachusetts, Table 53. The figures suggest that, even within the official service, the Commonwealth consistently exceeded proportional hiring through-

out the period 1963-1973. Thus one can hardly rely on a straight statistical analysis and still assert that a gross statistical disparity or stark pattern of discrimination against females exists in the Massachusetts civil service system.

As the district court observed, the statistical analysis does not tell the entire story with respect to the job opportunities available to women in the Commonwealth. Concededly, males and females do not always compete for the same jobs, and "a greater proportion of the male appointees than female appointees in permanent positions are in the higher grade and higher paying positions" (App. 79). However, these facts have not and cannot be linked to veterans' preference. While the Agreed Statement of Facts also suggests that the application of the veterans' preference statute has on occasion resulted in a greater proportion of male eligibles than female eligibles being certified, this impact is not quantified and certainly no clear pattern emerges from it. This case simply does not present an occasion in which a clear pattern, "unexplainable on grounds other than [gender-based discrimination]" emerges. *Arlington Heights*, *supra*, 429 U.S. at 266. Accordingly, a purpose to discriminate against women cannot be inferred from the impact of the statute on female civil service applicants. *Compare*, *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886).

Similarly, one cannot infer from the employment record of Helen B. Feeney that Mass. Gen. Laws c. 31, § 23, has had a permanent devastating impact on her career opportunities. Despite the fact that large numbers of Vietnam-era veterans were returning to the work force throughout the relevant time frame, Ms. Feeney consistently held a meaningful position in the official service through March 28, 1975 (App. 176). Furthermore, as Justice Murray pointed out in his dissent and as this brief demonstrates at part III, *infra*, even if Massachusetts utilized a five and ten point preference modeled on the federal

law, application of that preference would have nullified Ms. Feeney's opportunities for appointment to the specific positions she sought but failed to obtain under Massachusetts law. See part III, *infra*, at pp. 55-56.

Simply stated, Mass. Gen. Laws c. 31, § 23, has no greater impact on the employment opportunities of women than any other effective veterans' preference statute. If the kind of impact established by the record in this case is sufficient to support an inference of intentional gender-based discrimination, then every veterans' preference statute in the country is in jeopardy.

2. The District Court Mistakenly Relied on the Foreseeability of Impact of the Veterans' Preference Statute and its Perceived Lack of Job-Relatedness.

The district court isolated two other factors it deemed indicative of invidiousness: the foreseeability of the statute's impact and its perceived lack of job-relatedness. These factors are insufficiently indicative of intent. At the heart of the lower court's analysis is the premise that the foreseeable impact of veterans' preference is the reduction of job opportunities for women, and that intent to discriminate against females can be inferred from that fact. The argument is that the number of female veterans is small, that the Massachusetts legislature was presumptively aware of that fact when it enacted the statute, and that the legislature intended the natural and foreseeable adverse effect on nonveteran females worked by veterans' preference.

The lower court's obligation after *Washington* v. *Davis*, 426 U.S. 229 (1976), to look to all other evidence is not satisfied by the mere application of the "foreseeability of impact" test.

In the absence of other significant evidentiary factors, mere legislative awareness that a legitimate governmental action or

policy will have a disproportionate impact on a minority will not support an inference of discriminatory intent. *See, e.g., Austin Independent School District* v. *United States*, 429 U.S. 990, 991 n.1 (1976); *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144 (1977). In *Carey*, Mr. Justice Stewart, joined by Mr. Justice Powell, stated: "That the legislature was aware of race when it drew the district lines might also suggest discriminatory purpose. Such awareness is not, however, the equivalent of discriminatory intent." *Id.* at 180 (Stewart, J., concurring). The use of foreseeability of impact as the *sine qua non* of invidious intent has been convincingly repudiated by lower federal courts, which have repeatedly noted that the awareness of a disproportionate impact is not the equivalent of invidious intent. *United States* v. *City of Chicago*, 549 F. 2d 415, 435 (7th Cir. 1977); *Guardians Assoc. of New York City Police Department* v. *Civil Service Commission*, 431 F. Supp. 526, 534 (S.D. N.Y. 1977); *and see, United States* v. *Texas Education Agency*, 564 F. 2d 162, 168 (5th Cir. 1977).

In drawing an inference of discriminatory intent based on the presumed legislative awareness of the disproportionate impact of a veterans' preference on women, the court apparently applied a purely objective standard of intent traditionally associated with tort law. But, "[t]he principle applied in tort and criminal actions, that an actor is presumed to intend the natural and foreseeable consequences of his deeds, must yield to the entirely different considerations at work when a federal court is addressing an equal protection challenge to state legislation." *Feeney* v. *Massachusetts*, 451 F. Supp. 143, 155 (D. Mass. 1978) (App. 275) (Murray, J., dissenting). In applying this standard, the lower court inappropriately gave conclusive effect to the foreseeability of the perceived impact of the veterans' preference statute.

Under certain circumstances, the foreseeability of a discriminatory impact may well be one of several relevant considerations in seeking to determine legislative motive. As one element in the calculus, foreseeability of impact may prove useful. That a disadvantageous result is foreseeable, however, is of limited utility when assessing a statute like veterans' preference where the impact may so clearly be "explained on reasons other than gender."

Similar considerations significantly undermine the probative value of the third factor identified by the district court as being indicative of invidious intent — the statute's perceived lack of job-relatedness. If the only purpose served by Mass. Gen. Laws c. 31, § 23, were the promotion of an effective civil service system, then extension of a hiring preference to those passing entrance examinations could be perceived as a departure from the norm which might be indicative of discriminatory intent. Even then, however, it might legitimately be argued that military service imparts certain values and training so that veterans as a class are better qualified for civilian service than nonveterans. *Feeney* v. *Massachusetts*, 451 F. Supp. 143, 154 (D. Mass. 1978) (App. 274) (dissent of Murray, J.); *Feinerman* v. *Jones*, 356 F. Supp. 252, 260 (M.D. Pa. 1973).

In any event, promoting an effective civil service is manifestly neither the only nor the primary purpose behind Mass. Gen. Laws c. 31, § 23. As the district court itself has recognized, "the prime legislative motive of the challenged statute . . . [is] rewarding public service in the military," *Feeney* v. *Massachusetts*, 451 F. Supp. 143, 145 (D. Mass. 1978) (App. 254), and that is a perfectly legitimate, noninvidious goal. Thus all that can be said about the perceived lack of job-relatedness is that it is indicative of an intent to benefit veterans; it says nothing about an intent to discriminate against women. The same is true of any affirmative action hiring program which supersedes or supplements normal hiring patterns.

3. The District Court Ignored Arguments which Irrefutably Demonstrated the Lack of Intentional Gender-Based Discrimination.

In ascribing an illicit motive to the Massachusetts legislature, the district court ignored a number of factors which rebut any inference that the veterans' preference statute was designed to harm women. First among those factors is the legislative history of the preference itself, which is set forth in some detail in part IA of the Argument section in this brief.

Two significant conclusions may be drawn from that history. The first is that the extension of benefits to veterans in Massachusetts has historically occurred during or immediately following periods of armed conflict (*see* part IA, *supra*, at pp. 15-24). This fact illustrates that the legislative motivation for the extension of veterans' preference is a desire: (1) to reward those who have sacrificed in the service of their country; (2) to assist veterans in their readjustment to civilian life; and (3) to encourage patriotic service. *Brown* v. *Russell*, 166 Mass. 14, 43 N.E. 1005 (1896); *Opinion of the Justices*, 190 Mass. 611, 77 N.E. 820 (1906); *Hutcheson* v. *Director of Civil Service*, 361 Mass. 480, 281 N.E. 2d 53 (1972); *Mitchell* v. *Cohen*, 333 U.S. 411 (1948); *Johnson* v. *Robison*, 415 U.S. 361 (1974).

Second, the history demonstrates that as the federal government has expanded wartime "opportunities" for women to participate in the military, Massachusetts has consistently extended veterans' preference to the women who have availed themselves of the opportunity. *See*, pp. 22-24 *supra*. In each of the substantive revisions of Mass. Gen. Laws c. 31, § 23, and its precursors which has occurred since women first entered the military service in World War I, Massachusetts legislators have consistently provided for hiring preferences for those women. *See*, *e.g.*, Mass. St. 1919, c. 150; Mass. St. 1943, c. 194; Mass. St. 1954, c. 627, § 1.

Obviously, then, the legislative history does not suggest that the veterans' preference law is a "mere pretext" to mask invidious discrimination against females. *Geduldig* v. *Aiello*, 417 U.S. 484 (1974). The record in this case simply provides no logical basis for an assumption that the General Court would have enacted a less generous preference if more substantial numbers of women qualified as veterans, yet Appellants submit that this is precisely the type of assumption a court would have to make if it were to infer intentional discrimination in this case.

The district court also ignored the affirmative efforts of the Commonwealth to enhance the employment opportunities of women, perhaps the most significant of which were the state's ratification of the federal Equal Rights Amendment and its passage of a similar amendment to the State Constitution.[36] The unqualified support of these amendments, which are clearly designed to protect the rights of women, is an outward manifestation of intent which belies the notion that the state legislature is motivated by a desire to deny employment rights to females.

Viewed in context, the efforts of the Commonwealth in affording employment opportunities to females are laudable and progressive. The General Court has also eliminated sex-specific jobs in the civil service system, Mass. St. 1971, cc. 219, 221, and has expanded the range of jobs not subject to veterans' preference in the face of an assertion that the preference kept women from attaining goods jobs.[37] Similarly, the

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[36] On June 21, 1972, the General Court ratified the proposed Equal Rights Amendment to the United States Constitution. The General Court also ratified a proposed Equal Rights Amendment to the Massachusetts Constitution in two successive legislatures as required by Mass. Const. Amendments, Art. 48, Init., part IV, §§ 1-5, on August 15, 1973, by a vote of 266-0 and on May 14, 1975, by a successive, separately elected legislature, 217-55.

[37] In addition to eliminating gender-based distinctions in the civil service law, the General Court has greatly expanded the number of positions which

executive branch, through such devices as Mass. Exec. Order 116 (1975) has promoted the recruitment and appointment of females as if they were a disadvantaged minority.[38]

The employment practices of the Commonwealth are, therefore, totally inconsistent with any notion of intentional sex discrimination. Indeed, they demonstrate a pattern and practice of affirmative state action designed to guarantee equal employment opportunities for women. Nevertheless, the district court did not even consider these factors, which should have conclusively resolved the issue of illicit motive in favor of the Appellants. Its failure to do so is unexplainable on grounds other than its demonstrated desire to achieve a result which it felt socially acceptable.

III. The Original District Court Opinion Improperly Applied a Least Restrictive Alternative Test in Assessing the Constitutionality of the Massachusetts Veterans' Preference Statute.

Having determined that *Davis* is distinguishable from this case and, in the alternative, that the veterans' preference

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are excluded from civil service coverage. Mass. Gen. Laws c. 31, § 5. The statute has been amended 16 times since 1967. One of the most significant amendments was Mass. St. 1975, c. 134, which eliminated attorneys from civil service coverage and therefore mooted the actions of plaintiffs in the *Anthony* case. *Anthony* v. *Massachusetts*, 415 F. Supp. 485, 492 (D. Mass. 1976) (App. 208-209). *See also*, Mass. St. 1977, c. 822; Mass. St. 1977, c. 815.

[38] In 1975, the Governor of the Commonwealth issued Mass. Exec. Order 116, revising and amending Mass. Exec. Order 74, Governor's Code of Fair Practices, which is designed to implement a program of affirmative action within each state agency to ensure:

> . . . that the percentage racial and *sexual* makeup of the state work force should, at all levels, reflect the percentage racial and sexual makeup of the population where jobs exist. (Emphasis supplied.)

statute intentionally discriminates against women, the lower court found it unnecessary to reconsider and revise its earlier opinion. A finding on the issue of intent, however necessary it may be in analyzing the constitutionality of a facially neutral state statute, should not terminate a court's equal protection analysis. On the contrary, a finding on the issue is merely the starting point in that analysis. In the instant case the district court undertook no new analysis, and the arguments presented herein are therefore addressed primarily to the prior opinion appearing at 415 F. Supp. 485 (D. Mass. 1976) (App. 195-240).

While a finding that the veterans' preference statute does not intentionally discriminate against women does not terminate the equal protection analysis, it is virtually outcome-determinative. Without a finding of purposeful gender-based discrimination, a reviewing court would be forced to assess the disparate treatment of veterans and nonveterans only on the basis of the rational basis standard. This is so because the right to government employment is not fundamental in and of itself, *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 313 (1976), and because the distinction between veterans and nonveterans is not based on a suspect classification.[39]

Measured against the rational basis standard, Mass. Gen. Laws c. 31, § 23, would easily have withstood judicial scrutiny. Prior to the original decision of the court below, veterans' preference statutes[40] were uniformly upheld by the federal courts whenever challenged as a violation of the Equal

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[39] Only three classifications have been found suspect by the Supreme Court. They are race, *McLaughlin* v. *Florida*, 379 U.S. 184 (1964); ancestry or national origin, *Oyama* v. *California*, 332 U.S. 633 (1948); and alienage, *Graham* v. *Richardson*, 403 U.S. 365 (1971). *See generally*, *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 16 (1973).

[40] *Cf. Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953) (upholding a veterans' preference in the private sector).

Protection Clause. *Fredrick* v. *United States*, 507 F. 2d 1264 (Ct. Cl. 1974); *Rios* v. *Dillman*, 499 F. 2d 329 (5th Cir. 1974); *White* v. *Gates*, 253 F. 2d 868 (D.C. Cir.), *cert. denied*, 356 U.S 973 (1958); *Reynolds* v. *Lovett*, 201 F. 2d 181 (D.C. Cir. 1952), *cert. denied, sub nom. Wilson* v. *Reynolds*, 345 U.S. 926 (1953); *August* v. *Bronstein*, 369 F. Supp. 190 (S.D. N.Y.), *aff'd mem.* 417 U.S. 901 (1974); *Feinerman* v. *Jones*, 356 F. Supp. 252 (M.D. Pa. 1973); *Koelfgen* v. *Jackson*, 355 F. Supp. 243 (D. Minn. 1972), *aff'd mem.* 410 U.S. 976 (1973); *Russell* v. *Hodges*, 470 F. 2d 212, 218 (2d Cir. 1972).

Since that original opinion, and this Court's decision in *Davis*, three courts have assessed veterans' preference statutes subjected to equal protection challenge. *Bannerman* v. *Department of Youth Authority*, 436 F. Supp. 1273 (N.D. Cal. 1977); *Branch* v. *Du Bois*, 418 F. Supp. 1128 (N.D. Ill. 1976); *Ballou* v. *State Department of Civil Service*, 148 N.J. Super, 112, 372 A. 2d 333 (1977). Each applied a rational basis test and, after distinguishing *Anthony* v. *Massachusetts*, and concluding that no intent to harm women was present, each upheld the challenged veterans' preference statute. Given the admitted legitimacy of the state interests furthered by veterans' preference legislation, *Anthony* v. *Massachusetts*, 415 F. Supp. 485, 496 (D. Mass. 1976) (App. 213), the district court in this case could only have reached the same conclusion had it applied the rational basis test.

Assuming, *arguendo*, that the district court was correct in inferring that the statute was intended to harm women, the court still utilized an incorrect standard in assessing that statute's constitutionality. A statute which only implicitly draws lines based on gender can be subjected to no more intensive an inquiry than one which draws those lines explicitly. While some earlier gender-based cases were less than explicit on the appropriate standard of review, *see, e.g.*, *Reed* v. *Reed*, 404 U.S. 71 (1971); *Frontiero* v. *Richardson*, 411 U.S. 677

(1973); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), a single standard has now emerged which requires that gender-based classifications must be substantially related to the achievement of important governmental objectives. *Craig* v. *Boren*, 429 U.S 190 (1976); *Califano* v. *Goldfarb*, 430 U.S. 199 (1977). This Court has never applied "a least restrictive alternative" test in any of these gender-based cases. Nevertheless, it appears that the district court in this case, in fact, engaged in the kind of least restrictive alternative analysis usually reserved for strict scrutiny cases.[41] In the words of the district court:

> [T]he fact is that there are alternatives available to the state to achieve its purpose of aiding veterans, without doing so at the singular expense of another identifiable class, its women. . . . Given the fact that effective, but less drastic, alternatives are available, the state may not give an absolute and permanent preference in the area of public employment to its veterans at the expense of its women who, because of circumstances totally beyond their control, have little if any chance of becoming members of the preferred class. *Anthony* v. *Massachusetts*, 415 F. Supp. 485, 499 (D. Mass. 1976) (App. 219-220).

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[41] If this Court were to endorse the use of a least restrictive alternative test as a component of the assessment of sex-based classifications, it would in effect make gender a suspect classification. This is so because the Court already requires that sex-based classifications must be substantially related to the achievement of important governmental objectives, a standard which may not differ markedly from the compelling state interest test applied in strict scrutiny cases. To date this Court has not been compelled to designate sex as "suspect" and to treat sex-based cases under a strict scrutiny test. *Stanton* v. *Stanton*, 421 U.S. 7, 13 (1975).

On remand the majority again stated:

> The fact that there are less drastic alternatives available to the state to achieve its purpose of aiding veterans, underscores our conclusion that the absolute and permanent preferences adopted by the Commonwealth resulted from improper evaluation of competing considerations. *Feeney* v. *Massachusetts*, 451 F. Supp. 143, 150 (D. Mass. 1978) (App. 265).

Specifically, the district court implied that a point system modelled on the federal civil service statutes, 5 U.S.C. §§ 2108, 3309, 3311-3312 and 3316, was a less burdensome statute which was appropriately "designed to offer some reward for length of service in the armed forces and/or to recognize particular abilities or skills likely to have been acquired as a result of military service." *Anthony* v. *Massachusetts*, 415 F. Supp. 485, 499 (D. Mass. 1976) (App. 219-220).

This search for a less onerous alternative was not only incorrect as a matter of constitutional doctrine, it was also imperfect in fact. The majority opinion's acceptance of and advocacy for the federal "five and ten" point preference as a less restrictive alternative was made without any evidence concerning the effects of the federal veterans' preference. Available statistics suggest that the point system embodied in federal law is not demonstrably less restrictive than the Massachusetts positional preference.

In order validly to compare the state and federal civil service systems, one must assess their respective impact on women as a group and their effect (hypothetical in the case of the federal system) on Helen Feeney as an individual. As we have already demonstrated in part IIB(1), *supra*, in Massachusetts women obtained 43 per cent of the appointments to official

service positions during the 10-year period from 1963-1973. While the Commonwealth has been unable to ascertain the percentage of federal civil service appointments received by women in the same period, it does appear that the percentage of males in such federal positions (67.7 per cent) far exceeds the percentage of women occupying similar positions (32.3 per cent). U.S. Civil Service Commission, Bureau of Manpower Information Systems, Central Personnel Data File, Overview Report (June 30, 1977). A comparison between these two sets of figures, while imperfect, nevertheless indicates that the Massachusetts positional preference law has no more devastating an impact on females than the federal point system. Available sources also suggest that in federal as well as state employment, (a) males often hold better positions than females, and (b) the application of a veterans' hiring preference on occasion results in more male eligibles being certified than females. Hearings on Veterans' Preference Oversight before the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service, 95th Cong., 1st Sess. (1977) (comments of representative Frenzel).

As the dissenting opinion in the court below suggests, the end result of applying a five and ten point preference to the specific examinations which form the basis for Helen Feeney's compliant would be substantially the same as under the Massachusetts positional preference law. *Anthony* v. *Massachusetts*, 415 F. Supp. 485, 507 n.14 (D. Mass. 1976) (App. 239-240). (Murray, J., dissenting). For example, on the February 24, 1973, eligibility list, from which three names were to be certified and one person appointed to the position of Solomon Head Administrative Assistant, Ms. Feeney finished third solely on the basis of her examination (App. 76). Application of Mass. Gen. Laws c. 31, § 23, caused her to be ranked eleventh (App. 104-105), but even under a five and ten point system she would have been ranked sixth, well below the

point of certifiability. Similarly, on the May 18, 1974, examination, Ms. Feeney's examination score placed her in a five-way tie for the seventeenth position (App. 77). Under the Massachusetts positional preference she was ultimately ranked seventieth (App. 113-130), but even under the federal point system she would have dropped to a five-way tie for thirty-eighth position. Again, the final result is the same; Ms. Feeney would not be likely to obtain an appointment under either system.

Any competitive preference for veterans will have a corresponding collateral effect on nonveterans, including nonveteran females. Here, if there is a demonstrable difference between the effect of the Massachusetts position preference system and the Federal point system, it is minimal. The fact that the district court here failed to assess adequately the differences in the two systems only serves to underscore the fact, demonstrated in Part IB of this Argument, that the legislature is the appropriate forum for formulating veterans' benefits policies and designing appropriate veterans' preference statutes.

In summary, the district court erred at each significant point in its analysis and in each instance the error was caused by a misplaced reliance on the impact of the Massachusetts positional preference law. The court invoked the perceived impact of the statute first to support its untenable conclusion that the challenged statute is not facially neutral, then to support what amounted to an irrefutable inference of intentional gender-based discrimination, and finally to suggest that there were less burdensome alternatives available to the Massachusetts legislature. This talismanic invocation of the impact of the statute is not only based on a flawed assessment of the effect of Mass. Gen. Laws c. 31, § 23, but it is also totally inconsistent with *Washington* v. *Davis*, 426 U.S. 229 (1976). Accordingly, this Court should reverse the district court and hold

that the Massachusetts veterans' preference statute does not deny Helen B. Feeney equal protection of the law.

Conclusion.

For the reasons stated above, the judgment and order of the district court should be reversed.

Respectfully submitted,

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